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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-198

MORTON INTERNATIONAL, INC.,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR RESPONDENT IN OPPOSITION

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SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Respondent Southern Pacific Transportation Company (hereinafter "Southern Pacific") hereby prays that the Petition for Writ of Certiorari to the Utah Supreme Court filed by Morton International, Inc. (hereinafter "Morton") be denied by the Court.

OPINIONS BELOW

The judgment of the District Court of Salt Lake County, Utah was not reported nor was there a written opinion. The opinion of the Utah Supreme Court from which the Petition is taken is reported at 495 P.2d 31 (1972), and is set forth in Appendix A.

JURISDICTION

Morton has invoked this Court's jurisdiction under 28 U.S.C. §1257(3). Southern Pacific contends that jurisdiction on Writ of Certiorari is not present inasmuch as no substantial federal question is presented and the decision of the Utah Supreme Court rests upon adequate state grounds.

QUESTIONS PRESENTED

1. Whether the holding of the Utah Supreme Court was based upon any denial of vested water rights Morton claims to enjoy.

2. Whether Morton has any vested water rights to the water of the Great Salt Lake on the basis of appropriation prior to Utah's Statehood in view of the fact the Great Salt Lake is a navigable body of water which the United States held in trust for the State of Utah until its Statehood.

3. Whether a substantial federal question is presented if in fact the Utah Supreme Court did, under the particular facts of this case, deny Morton vested water rights which it claims to enjoy.

4. Whether the Utah Supreme Court's explicit holding that Morton's right to extract salt from the water of the Great Salt Lake was a non-exclusive right depriving Morton of a compensable claim against Southern Pacific constitutes an adequate, independent determination of state law rendering review by this Court improper.

STATEMENT OF THE CASE

Southern Pacific accepts the Statement of the case as stated by Morton in its Petition, but objects to the characterization of the holding of the Utah Supreme Court on page 10 thereof because, contrary to Morton's inference, the Utah Supreme Court did not base its holding on the absence of vested water rights on the part of Morton.

Said decision was based upon the finding of the non-exclusive nature of Morton's right to withdraw salt from the water of the Great Salt Lake (hereinafter the "Lake") and the legal conclusions resulting from that determination, with the issue of vested water rights being dictum and not necessary to the holding in the case.

ARGUMENT

I.

THE DECISION OF THE UTAH SUPREME COURT DOES NOT REST UPON DENIAL OF MORTON'S PURPORTED VESTED WATER RIGHTS.

Morton's argument in support of its Petition is based upon the assertion that the Utah Supreme Court's decision depriving it of a cause of action against Southern Pacific was grounded upon its denial of the vested water rights Morton sought to establish on the strength of the fact its predecessors in interest diverted water from the Lake for the purpose of recovering the salt therefrom prior to Utah's Statehood in 1896.

A careful reading of the decision (See Appendix A) reveals that the decision was actually based upon the facts that the State owned the minerals contained in the water of the Lake, that the right to extract salt therefrom granted to Morton by the

State was non-exclusive in nature, and that said right of extraction did not guarantee Morton a specific saturation point. From those determinations the Court ruled that Morton had no cause of action against anyone who might affect the salinity of the water of the Lake.

The Utah Supreme Court specifically discussed several of Southern Pacific's contentions, among them its reference to "its (Morton's) diligence rights in the water reserved against the State" and stated that "all and none of which (including the diligence rights issue) we believe to be dispositive here — *and we so hold.*" (R. 354) [Emphasis added]

The Court then stated that "what we do think is important and dispositive here, is the question of who owns the salt in solution in the waters of the lake." (R. 354) It went on to reason that since the cases of *Deseret Livestock v. State,* 110 Utah 239, 171 P.2d 401 (1946) and *Utah v. United States,* —U.S.—, 91 S.Ct. 1775 (1971) conclusively determined ownership of the bed of the lake and the minerals contained in the bed and the water thereof to be in the State of Utah, Morton's right to the salt depended upon the rights thereto it had obtained from the State of Utah.

From there it went on to hold that under State law, Morton's rights to the salt were non-exclusive in nature, and that it followed that Morton had no cause of action against Southern Pacific, the State of Utah, or other salt extractors for any diminution of the salt content in the water of the Lake.

Morton concurred with this view in its Petition For Rehearing and Brief In Support Thereof wherein it stated:

> In essence, this Court's decision is that Morton's right to extract and process salt from Great Salt Lake

waters is valid, but, since it is a non-exclusive right, Morton is not entitled to a remedy for dilution of the salt concentration caused by the Southern Pacific, the holder of another non-exclusive right from the State.

Morton's attempt in its Petition to base the Utah Supreme Court's decision upon a denial of vested water rights purportedly obtained by its predecessors in interest under federal and territorial law misstates the actual holding. Morton was not denied any rights obtained under federal law or protected by the Fourteenth Amendment to the Constitution of the United States by the Utah Supreme Court's decision.

This being the case, Southern Pacific submits that no question exists which would give this Court jurisdiction on a Writ of Certiorari.

II.

IF THE UTAH SUPREME COURT DID IN FACT DENY MORTON VESTED WATER RIGHTS:

A. THE COURT WAS CORRECT IN ITS JUDGMENT

B. DENIAL OF MORTON'S WATER RIGHTS DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION WHICH THIS COURT NEED DECIDE.

Although it is clear that the Utah Supreme Court's decision does not rest or rely upon any denial of Morton's vested water rights, Southern Pacific submits that even should the decision be construed to do so: (1) such a decision is clearly correct and (2) that any such denial does not raise a substantial federal question which would require the granting of Morton's Petition for Writ of Certiorari.

A. THE COURT WAS CORRECT IN ITS JUDGMENT.

Morton's claim to vested water rights in the Great Salt Lake is grounded in diligence rights it claims its predecessors in interest enjoyed prior to Utah's Statehood in 1896.

More specifically, Morton claims its diligence rights under Section 9, Act of July 26, 1866, now 43 U.S.C. §661 and on the Laws of the Territory of Utah, 24th Session, Chapter XX, Section 6 (1880) (p. 3 of Morton's Petition). However, it is clear that Morton has no rights under those acts because: (1) The Act of 1866 does not apply to navigable waters and (2) the laws of 1880 provide for diversion only for a beneficial use, and diverting water from the Lake for the exclusive purpose of removing salt therefrom (whether before or after Utah's Statehood) has been held not to be such a beneficial use in *Deseret Livestock v. State, supra.*

The ability of the federal government to grant rights in federal lands and the water contained thereon is, of course, based upon ownership of the land and the water in question. In other words, the federal government couldn't grant rights in water contained on land it didn't own. As stated in *Howell v. Johnson,* 89 Fed. 556 (C.C. Mont. 1898):

> Being the owner of these lands, it (the federal government) has the power to sell or dispose of any estate therein or any part thereof. The water in an *innavigable* stream flowing over public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper. (p. 558) [Emphasis added]

That the Court in *Howell v. Johnson* was correct in assuming that only non-navigable waters on the public domain were subject to federal disposal stems from the established constitutional principle of equality of the states as enunciated by this Court in *Shively v. Bowlby,* 152 U.S. 1 (1893). In that case, it was held that:

> The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands below the high water mark, within their respective jurisdictions. (p. 26)

Morton's public lands argument must fail, therefore, because the beds of navigable bodies of water were never public domain, but were held in trust for the future states. Since the federal government couldn't (except under the limited circumstances outlined at page 48 of *Shively v. Bowlby, supra*) grant rights to the beds of such navigable waters, it couldn't grant rights in the waters on or in them. In so holding, the Court in *Shively v. Bowlby* stated at pages 49 and 50 that:

> The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the *navigable waters and the soils under them, whether within or above the ebb and flow of the tide,* shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote these purposes, *shall not be granted away* during the period of territorial government; *but* unless in the case of some international duty or public exigency, *shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted to the Union,* with all the powers and prerogatives appertaining to the older States in regard to such

> waters and soils within their respective jurisdictions, in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community. [Emphasis added]

Because Utah had the same rights as the original states with regard to navigable waters, it had the right to determine what constituted a beneficial use of those waters. In *Deseret Livestock v. State, supra,* the Utah Supreme Court determined that diversion of water from the Great Salt Lake for the purpose of removing minerals therefrom was not a beneficial use unless the person diverting the water owned the salt contained therein.

Inasmuch as this Court held that the Great Salt Lake was navigable at Statehood, and that Utah owns the minerals contained in its water, *Utah v. United States, supra,* diversion of Lake waters by Morton's predecessors for the sole purpose of removing salt therefrom was not for a beneficial purpose because those predecessors did not own the salt contained therein.

To uphold Morton's contention would be to deny Utah the equal rights it obtained upon entry into the Union contrary to the constitutional rights guaranteed it when it became a State. Southern Pacific submits that this is untenable and that the decision of the Utah Supreme Court must be sustained and the Petition by Morton denied.

B. ANY DENIAL OF MORTON'S WATER RIGHTS DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION WHICH THIS COURT NEED DECIDE.

It is an established principle that in order for this Court to grant a Petition for Writ of Certiorari, petitioner must present a substantial federal question for review, and that failure to do so, even though federal rights may have been denied, is cause for denial of the Petition. *Palmer Oil Co. v. Amerada Corp.*, 343 U.S. 290 (1952); *Zucht v. King*, 260 U.S. 174 (1922).

Should this Court decide that the Utah Supreme Court did in fact base its holding on a denial of Morton's purported vested water rights acquired before Utah's Statehood, Southern Pacific contends that no substantial federal question is presented thereby inasmuch as such denial would apply only to Morton and the other companies extracting minerals from the lake under a set of unusual and highly individual circumstances.

Morton baldly asserts at page 10 of its Petition that if the Utah Supreme Court's decision is allowed to stand, "severe repercussions on all owners of water rights obtained under federal law" will result. Inasmuch as the Great Salt Lake is unique in that it is the only lake in the United States which has a mineral content great enough to make extraction of minerals therefrom economically feasible, the question of water rights and how they relate to ownership of the minerals therein is a legal question by definition restricted to the State of Utah and those who withdraw minerals from the water of the Great Salt Lake. This question can hardly be construed, therefore, to affect all those in the arid western states who hold vested water rights under federal law.

Therefore, Southern Pacific submits that Morton's Petition does not present a cognizable substantial federal question upon which to base the Court's allowing Morton's Petition for Writ of Certiorari to be granted.

III.

THE DECISION OF THE UTAH SUPREME COURT IS SUPPORTABLE AS A MATTER OF INDEPENDENT STATE LAW AND IS NOT SUBJECT TO REVIEW BY THIS COURT.

It is an established rule of law that a decision by a State court supportable as a matter of state law is not subject to review by this Court, even though the State court also (whether correctly or incorrectly) passed upon issues of federal law. *Murdock v. Memphis,* 20 Wall. 590, 636 (1874); *Berea College v. Kentucky,* 211 U.S. 45, 53 (1908); *Herb v. Pitcarin,* 324 U.S. 117, 125-126 (1944); *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 917-920 (1950). Southern Pacific submits that the decision of the Utah Supreme Court is broad enough, without reference to the federal question raised by Morton, to sustain the judgment on the grounds of state law, precluding review by this Court of that decision. *Eustis v. Bolles,* 150 U.S. 364, 370 (1893).

The Utah Supreme Court stated the basis of its decision was as follows:

> We think there is no compensable claim here because plaintiff has no exclusive right against the State or others to the salt or the water from which it is converted, has no right given by the State to divert the water at a specific point. (R. 355).

Assuming arguendo that Morton had the vested water rights it claims to have based upon diversion prior to Utah's Statehood, the conclusion cited above would still preclude Morton's recovery because its rights to divert water would not grant it ownership to the salt, *Deseret Livestock Co. v. State, supra,* which means that the nature of the Royalty Agreement with the State of Utah would govern Morton's rights.

The Utah Supreme Court's holding was based upon state law construing a state contract, with the Court stating that the non-exclusivity thereof was the factor preventing recovery. No federal questions are involved in that decision, and the decision on this ground is clearly independent from any pronouncement by the Utah Supreme Court on the status of Morton's water rights.

Thus, even if this Court granted Morton's prayer for relief at page 13 of its Petition to "confirm Morton is the owner of vested water rights under federal law," the result would be the same inasmuch as the Agreement granting rights to remove salt from the diverted water has been held to be non-exclusive in nature thus depriving Morton of a cause of action herein.

Because the holding of the Utah Supreme Court squarely rests on state law interpreting the rights of a state contract, there are adequate independent state grounds upon which to sustain its judgment, irrespective of the Court's purported views on the validity of Morton's water rights.

Therefore, under established law, a Writ of Certiorari in this case should not be granted.

CONCLUSION

For the foregoing reasons Southern Pacific respectfully submits that Morton's Petition of Writ of Certiorari to the Supreme Court of the State of Utah should be denied.

Respectfully submitted,

Haldor T. Benson
James R. Amschler
Counsel for Respondent

APPENDIX A

MORTON INTERNATIONAL, INC., a corporation,
Plaintiff and Appellant,
vs.
SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,
Defendant and Respondent,
HARDY SALT COMPANY, a corporation,
Amicus Curiae,
SOLAR SALT COMPANY, a corporation,
Amicus Curiae.

No. 12557
FILED
March 14, 1972
L. M. Cummings, Clerk

HENRIOD, Justice,

Appeal from a summary judgment dismissing Morton's complaint that asked for an injunction and damage incident to the defendant railroad's construction of a rock and earth causeway across part of Great Salt Lake pursuant to an easement granted by the State of Utah for such purpose in August 1956. Affirmed with costs to the railroad.

Morton and its predecessors have diverted lake waters to capture salt in solution by evaporative precipitation, since before 1903[1], the chop-off date after which appropriation of water for a beneficial use, had to filter through the State Engineer by formal application and hearing. Other companies, including amici curiae, Hardy Salt Co. and Solar Salt Co., enjoy similar histories. Morton's point of diversion has been and is at the south end of the lake approximately 30 miles south of the railroad's cause-

way, which for practical purposes separates the lake into a North and a South lake connected only by two 15-foot openings, causing the South Lake, into which flows essentially fresh water, amounting to 90 per cent of the total intake, to be one foot higher with a resulting flowage northward through the openings, causing a dilution of salt content in the South Lake waters and a corresponding increased salinity in the North Lake waters. It is this dilution about which this litigation revolves.

The dilution mentioned allegedly commenced after the construction of the causeway and, if true, certainly after a written agreement was executed in September 1954 between Morton and the State, to settle a legal action between them, and without prejudice to each's claims. In that agreement Morton was "to have the continuing right to appropriate, remove and divert water of and from Great Salt Lake for the purpose of extracting salt therefrom, provided, however that this agreement shall not be construed to relieve Morton from full compliance with Title 73, Utah Code Annotated 1953," requiring an application and certificate to appropriate water.

The reading of defendant's brief discloses certain objections and observations that make it sound like the defendant here is the State of Utah — such as plaintiff's failure to conform to its agreement of September 1954 mentioned above, its diligence rights in the water reserved against the State, the right of the railroad to assert defenses being that of the State, whether the railroad is engaged in a public endeavor, whether plaintiff has rights based on its failure to have made application for appropriation under Titles 73 and 65-1-15, Utah Code Annotated 1953, and the like, — all and none of which we believe to be dispositive here, — and we so hold.

What we *do* think is important and dispositive here, is the question of who owns the salt in solution in the waters of the lake. Although there was some question about this important matter before 1946, there was none thereafter, since we held in a somewhat similar case[2] that "the salt . . . is contained within Great Salt Lake, which is a navigable body of water. Because it is a navigable body of water its bed belongs to the state subject to the control of Congress for navigation in commerce. . . . It is our opinion that the state as the owner of the beds of navigable bodies of waters is entitled to all valuable minerals in or on them," — such conclusion being affirmed and established by the U.S. Supreme Court in the most recent decision on June 6, 1971[3]. Plaintiff cites many Territorial and State statutes having to do with the right to *use* water. Its only claim to ownership of the salt is by "silent acquiescence" of public authorities, with resulting "riparian" rights. Such claim is without merit.[4]

The reason we think that ownership of the salt is of primary import here is that plaintiff asserts an ownership in the salt in solution in the waters of the lake by virtue of its continued appropriation of part thereof. This thesis does violence to the concept and authorities mentioned in the next preceding paragraph, and indulges the assumption that plaintiff not only had an ownership interest in the salt solution and the bed of the lake to the exclusion of the State as long as its agreement with the State persisted, — possibly in perpetuity according to such contract, — but as to many others having agreements with the State to divert the water and extract the salt therefrom, as prevails with respect to the amici curiae mentioned herein. It is obvious that plaintiff's right to divert and precipitate the salt is a nonexclusive right, and that no matter what you call it, — a diligence right, a license, a profit a prendre, a lease, or a contract to sell, — the right is circumscribed by the provisions of Title 65-1-15, U.C.A. 1953,

reserving to the State the salt in the water, "to be *sold* by the state land board *only* upon a royalty basis." The plaintiff's agreement with the State of September 1954, among other things, provides for and requires the payment of so much per ton for salt processed.

The State owning the salt and plaintiff having but a nonexclusive right to extract and process it, the basic question remains as to whether construction of the railroad's causeway, which concededly diluted the water of its salt content in the so-called South Lake, created a compensable claim against the railroad in favor of plaintiff, concededly damaged in the sense that dilution of the water it diverts will cost more in the salt reduction process. We think there is no compensable claim here because plaintiff has no exclusive right against the State or others to the salt or the water from which it is converted, has no right given by the State to divert the water at any *specific* point. It can do so at any available point along the lake, either south or north of the causeway, has no vested claim to a beneficial use of the water,[5] has filed no claim for mineral rights, and could, but for the expense involved, divert water as well from any point on the lake where the salt in solution may exceed that in the South Lake.

If the plaintiff, under such circumstances had a compensable claim against the railroad, it would have a claim also against all others having contracts to divert water for salt production, such as the amici curiae here, for interference with its right to take the water from the lake. Its theory would contemplate a guaranteed mean saturation point to be accomplished by the State, by other nonexclusive diverters, administrators of waters flowing into the lake, and perhaps others, with an adjunctive either express or implied warranty by the State that the public, state-owned waters of Great Salt Lake, could be used for no purpose what-

ever, affecting the public weal, for private contract, leasing to others, regulation of traffic thereon by Congress, or otherwise, if the result threatened the dilution of the waters that plaintiff chooses to divert in is business. We are of the opinion that the plaintiff could not contend that the considerable rise in the lake level that has occurred in the past few years which would appear also to be dilutive of the salt water, would give rise to a compensable claim against the State.

The Great Salt Lake is the property of Utah subject only to regulation of navigation by Congress. The State has given the railroad a non-exclusive right to build the causeway, which right does not prevent the State from granting some other road such a right, just as it does not prevent the State from giving other persons or companies rights similar to Morton's.

Although plaintiff's complaint alleges it is a third-party beneficiary under the State's contract with the railroad because the easement was granted subject to a provision that the railroad would compensate surface owners and lessees for damage during construction and operation of the causeway, no point on appeal was urged for the contention that plaintiff was a "surface owner," although a point was made in essence that it was a "lessee," — which latter we have said has no merit. We are not called upon to determine whether Morton is a "surface owner" or not, but we are constrained to observe that we think such appellation does not apply to those incidentally damaged by water dilution, but at least to damage of some tangible existing physical property or facility owned by anyone, whether he has rights to remove salt water or not.

The briefs extensively discuss contractural matters anent rights and duties between Morton and the State, which latter is no party to this litigation. We are not constrained to discuss or de-

cide those issues here, but only between Morton and the railroad inter se. In doing so we think the summary judgment was correct. We do this being mindful of the magnitude of the litigants' problems and interests. We would hope that if engineering-wise it would be practical and not inordinately costly, the litigants here, the amici curiae and all others having an economic interest in a constant and normal concentration of salinity in the lake, well might serve themselves and the public welfare, if somehow they could unite in an effort to maintain the waters of the lake in their natural saline state.

WE CONCUR:

.....

E. R. Callister, Jr., Chief Justice

.....

R. L. Tuckett, Justice

.....

A. H. Ellett, Justice

.....

J. Allen Crockett, Justice

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[1]Chap. 100, Laws of Utah 1903; Sec. 73-3, U.C.A. 1953.

[2]Deseret Livestock Co. v. State, 110 Utah 239, 171 P.2d 401 (1946).

[3]Utah v. United States, — U.S. ...., 91 S.Ct. 1775, ...L.Ed. .... (1971).

[4]See footnotes 2 and 3.

[5]Deseret Livestock Co. v. Utah, supra, footnote 2, where it is said "The only manner in which water can be appropriated is by being placed to a beneficial use. The use of water for the precipitation of salt is such a beneficial use, and if appellant were seeking to appropriate water to carry salt *which belonged to it*, it would be placing the water to a beneficial use. . . . However, *appellant does not own the salt.*"